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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
LOUISIANA ENERGY SERVICES, L.P.	)	Docket No. 70-3070-ML
	)	
(Claiborne Enrichment Center)	)	

ANSWER OF LES TO CANT'S CONTENTIONS T, U AND W

I. INTRODUCTION

On January 18, 1994, Intervenor Citizens Against Nuclear Trash (CANT) proffered nontimely contentions T, U and W pursuant to 10 C.F.R. §§ 2.714(a)(1) and (b).[1/] Pursuant to 10 C.F.R. § 2.714(c), Applicant Louisiana Energy Services ("LES") herein responds to Intervenor's nontimely contentions.

As explained below, Intervenor fails to justify Contentions T and U when analyzed against the factors specified in 10 C.F.R. § 2.714(a)(i)-(v), as well as § 2.714(b)(2)(iii). Contention T is a technical matter of which Intervenor was aware at the time it filed its original contentions (October 3, 1991). Contention U is a comment on the adequacy of the NRC's Draft Environmental

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1/ "Citizens Against Nuclear Trash's First Supplement to Contentions on the Construction Permit/Operating License Application for the Claiborne Enrichment Center," January 18, 1994 ("Supplemental Contentions").

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Impact Statement ("DEIS")[2/] preparation process, and as such also fails the balancing test of § 2.714(a)(1) because this process has been in effect for several years. Intervenor provides no adequate reasons to justify such nontimely filings.

Further, even if Contentions T and U were timely, they fail to satisfy the legal standards for admissibility of contentions codified at section 2.714(b) and (d). Contention T is based on a mistaken belief that Freon (CFC-11) cools the centrifuges and that a change of refrigerants will affect centrifuge operation. Contention U takes issue with the NRC staff's administrative process for preparation of a DEIS and is, in effect, a challenge to existing regulations. Therefore, Intervenor's Supplemental Contentions T and U should be rejected by the Licensing Board.

Although Applicant does not agree with many of the assertions in Contention W, Applicant believes this contention has merit as a comment on the DEIS and should be incorporated in that process.

II. BACKGROUND

On January 31, 1991, LES filed a license application to construct and operate the Claiborne Energy Center ("CEC") uranium enrichment facility in the vicinity of Homer, in Claiborne Parish, Louisiana. On July 16, 1991, the Licensing Board issued

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2/ NUREG-1484, "Draft Environmental Impact Statement for the Construction and Operation of Claiborne Enrichment Center, Homer, Louisiana," November 1993.

a Memorandum and Order acknowledging that CANT had established standing based on a Petition to Intervene filed June 20, 1991. Initially, the Board ruled that contentions should be filed by August 12, 1991, but in a Memorandum and Order dated August 16, 1991, granted Intervenor an extension to October 3, 1991. Intervenor filed Contentions A-S on that date, and now files three additional contentions (T, U and W) about twenty-eight months later. The Licensing Board heard oral arguments on Contentions A-S at a prehearing conference on November 14, 1991, and ruled on their admissibility in a December 19, 1991, Memorandum and Order.

III. ARGUMENT

Applicant addresses below the legal standards for admitting contentions, and in particular, nontimely contentions. Applicant then applies those standards to each of Intervenor's Supplemental Contentions.

A. NRC Standards For Contentions

1. Standards for Admissibility[3/]

To be admissible, contentions must comply with the Commission's requirements of 10 C.F.R. § 2.714(b)(2), which provide that:

3/ We recognize that the Licensing Board acknowledged most of these standards in Louisiana Energy Services, L.P. (Claiborne Enrichment Center) 34 NRC 332 (1991), but include them here for clarity.

(2) Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide the following information with respect to each contention:

(i) A brief explanation of the bases of the contention.

(ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.

(iii) Sufficient information (which may include information pursuant to paragraphs (b)(2)(i) and (ii) of this section) to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner can amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's document.

Commenting on section 2.714(b)(2)(i)-(iii), the Commission stated that:

These sections demand that all petitioners provide an explanation of the bases for the contention, a statement of fact or expert opinion upon which they intend to rely, and sufficient information to show a dispute with the applicant on a material issue of law or fact. If any one of these requirements is not met, a contention must be rejected. Rules of practice for Domestic Licensing Proceedings -- Procedural Changes in

the Hearing Process, 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989).

Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991).

Admissibility of contentions also is addressed under section 2.714(d)(2), which provides that the Atomic Safety and Licensing Board shall, in ruling on the admissibility of a contention, refuse to admit a contention if:

> (i) The contention and supporting material fail to satisfy the requirements of paragraph (b)(2) of this section; or
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> (ii) The contention, if proven, would be of no consequence in the proceeding because it would not entitle petitioner to relief.

Further, the Commission has long held that a licensing proceeding "is plainly not the proper forum for an attack on applicable statutory requirements or for challenges to the basic structure of the Commission's regulatory process," and that "if someone wants to advance generalizations regarding his particular views of what applicable policies ought to be, a role other than as a party to a trial-type hearing should be chosen." Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20, 21 n.33 (1974).

Section 2.714 was amended by the Commission on August 11, 1989 (54 Fed. Reg. 33,168 (1989)), inter alia, to "raise the threshold for the admission of contentions to require the proponent of the contention to supply information showing the

existence of a genuine dispute with the applicant on an issue of law or fact." 54 Fed. Reg. at 33,168.[4/] The Commission also commented on how a genuine dispute is to be shown:

> In addition to providing a statement of facts and sources, the new rule will also require intervenors to submit with their list of contentions sufficient information (which may include the known significant facts described above) to show that a genuine dispute exists between the petitioner and the applicant or the licensee on a material issue of law or fact. This will require the intervenor to read the pertinent portions of the license application, including the Safety Analysis Report and the Environmental Report, state the applicant's position and the petitioner's opposing view.

Id. at 33,170.

2. Standards for Nontimely Contentions

Contentions filed later than fifteen days prior to the special or first prehearing conference are treated as late-filed. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-82-91, 16 NRC 1364, 1366-7 (1982); 10 C.F.R. § 2.714(b)(1). Late petitioners have a "substantial burden" in justifying their tardiness. Nuclear Fuels Servs., Inc., and New York State Atomic and Space Dev'l Auth. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975). Nontimely contentions may be admitted only if they satisfy the legal standards for

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4/ The regulation actually requires a genuine dispute on a material issue of law or fact. The Commission has defined a "material" issue of law or fact as one where "the resolution of the dispute would make a difference in the outcome of the licensing proceeding." 54 Fed. Reg. at 33,172. This is consistent with 2.714(d)(2)(ii).

admissibility discussed above and also upon a favorable balancing of the five factors set forth in 10 C.F.R. § 2.714(a)(1):

> (i) Good cause, if any, for failure to file on time.
>
> (ii) The availability of other means whereby the petitioner's interest will be protected.
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> (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
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> (iv) The extent to which the petitioner's interest will be represented by existing parties.
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> (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

The petitioner bears the burden of showing a favorable balance of these factors. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 331 (1983).

These factors also apply to nontimely contentions based on "data or conclusions in the NRC draft or final environmental impact statement . . . that differ significantly from the data or conclusions in the applicant's document." 10 C.F.R. § 2.714(b)(2)(iii). In promulgating this rule, the Commission expressly emphasized:

> that these amendments to § 2.714(b)(2)(iii) are not intended to alter the standards of § 2.714(a) . . . as interpreted by Commission caselaw, e.g., Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983), respecting late-filed contentions nor are they intended to exempt environmental matters as a class from the application of those standards.

54 Fed. Reg. at 33,172 (1989). The Commission had specifically endorsed a three-part test in Catawba for determining the good

cause factor in § 2.714(a)(1)(i) for nontimely contentions based on newly-issued NRC staff documents. The test supports the Commission's position that "the institutional unavailability of a licensing-related document does not establish good cause for filing a contention late if information was available early enough to provide the basis for the timely filing of that contention," Catawba, CLI-83-19, 17 NRC at 1048, and requires a determination of whether the nontimely contention:

1. is wholly dependent upon the content of the new document;

2. could not therefore have been advanced with any degree of specificity (if at all) in advance of the public availability of that document; and

3. is tendered with the requisite degree of promptness once the Staff document comes into existence and is accessible for public examination.

Id. at 1043-4.

In sum, when the tests in Catawba are applied to the requirements of section 2.714(b)(2)(iii), contentions on NEPA issues shall be based on the environmental report, and good cause for late environmental contentions does not exist without a showing that the data or conclusions in the environmental report differ significantly from the data or conclusions in the DEIS.

Of the five factors of section 2.714(a)(1), "good cause is more heavily weighted." Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1292 (1984). If the good cause factor weighs against admission of the tardy contention, the proponent of the contention must make a "compelling showing"

on the other four factors in order to be successful. Cincinnati Gas & Elec. Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-83-58, 18 NRC 640, 662-63 (1983); Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725 (1982); West Valley, CLI-75-4, 1 NRC at 275 ("the burden of [justification] on the basis of the other factors in the rule is considerably greater where the late comer has no good excuse").

B. Contention T

1. Summary of Intervenor's Position

Intervenor's Contention T alleges that the design of the CEC is invalid because it relies on CFC-11 for cooling, and the Environmental Protection Agency ("EPA") has banned use of CFC-11 after January 1, 1996. As a result, according to Intervenor, LES must be banned from constructing the CEC or LES must find a substitute coolant for CFC-11. Intervenor asserts that any substitute coolant should be identified in an amended FSAR with an explanation of how or whether the new coolant will affect other factors in the CEC's design, expected uranium emissions, and the type of lubricants to be used.

2. Intervenor is Without Good Cause for Filing This Contention

Intervenor claims to have satisfied the "good cause" factor for Contention T because:

- "The EPA did not issue public notice of its ban on CFC-11 until December 10, 1993"; and
- Expert assistance to prepare the contention was not available to Intervenor during the winter holidays.

Supplemental Contentions at 5.

Intervenor has failed to show good cause. A ban on production of CFCs (including CFC-11) was enacted on November 15, 1990 (Clean Air Act Amendments of 1990, Pub.L. 101-549), and was codified as 42 U.S.C. § 7671c. EPA's ban cited by Intervenor is no more than an acceleration of the 1990 Clean Air Act schedule to phase out CFC production four years earlier than planned. Further, Applicant's SAR § 2.1.2.2.7 and ER § 4.2.2.5, as filed on January 31, 1991, discussed use of CFCs and the potential for a ban on production. For example, SAR § 2.1.2.2.7 noted that CFCs:

> are used to cool water and air at the facility to improve the efficiency of the enrichment process. . . . It is anticipated that before operation of the facility, a suitable substitute for CFCs, such as [HCFCs], which greatly reduce the impact on stratospheric ozone concentration, will be commercially available and could be used at the facility. [Reference omitted.]

Thus, all the information to provide the basis for Intervenor's contention was available for the timely filing of a contention, i.e., that the CEC would use CFCs (available in the SAR) and that production of CFCs would be banned early in the operating life of the facility (available in 1990 Clean Air Act

amendment, and alluded to in the SAR). EPA's altering the date of the production ban did not raise any new issues that could not have been raised in a timely fashion.

Intervenor had the information necessary to file this contention for a period of about 35 months. The unavailability of an expert during a few weeks of the winter holidays is not good cause for the untimely contention.

3. Lacking Good Cause, Intervenor Has Failed to Make the Requisite Compelling Showing on the Remaining Four Factors of § 2.714(a)(1) To Warrant Admission of Its Late Contention

To justify a nontimely contention, in the absence of good cause, Intervenor must make a compelling showing on the other four factors of section 2.714(a)(1). Zimmer, LBP-83-58, 18 NRC at 662-63. Also, factors (ii) and (iv) are accorded less weight than factors (iii) and (v). Commonwealth Edison C. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 245 (1986); South Carolina Elec. and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981). Thus, even if the Licensing Board determines that factors (ii) and (iv) weigh in favor of admitting a nontimely contention, these two factors are entitled to less weight than the other three factors, which weigh against admission of the subject contention.

Factor (ii)

In response to the requirement of factor (ii), Intervenor has noted that "[t]here is no other means by which CANT's interest can be protected." Supplemental Contentions at 5.

Intervenor's concern over use of CFCs is addressed by EPA in accelerating the ban on production. This production ban will result in discontinuing the use of CFCs as desired by Intervenor. At the time Applicant substitutes for CFCs (as noted in the SAR) it will so inform the NRC. The NRC, representing the public interest can be assumed to protect Intervenor's interest in this matter. To the extent Intervenor wishes to comment, it can do so after reviewing information that will be placed in the NRC public document room when the substitution is made.

Intervenor has stated no real interest to be protected in this proceeding, and has not indicated why its interests, if any, in this issue are not adequately represented by an adequate NRC staff assessment of safety, environmental, and legal issues related to CFC use and phaseout.

Factor (iv)

Factor (iv) is similar, in this instance, to factor (ii). Intervenor claims that it is the only party that can represent its interests. For the reasons stated by Applicant in the discussion of factor (ii) above, Intervenor has not shown any interest, or that its interests, if any, will not be represented

by appropriate NRC staff action in this proceeding. Thus, factor (iv) should weigh against a favorable balance.

Factor (iii)

In response to the requirement of factor (iii), Intervenor claims its participation in the proceeding can be expected to aid in the development of a sound record with regard to this issue. This claim is based on Dr. Makhijani's technical evaluation of the facility.

Dr. Makhijani's affidavit provides no information other than his intent to testify on Intervenor's behalf "regarding the . . . illegality of CFC-11 as a refrigerant for the centrifuges at the [CEC]." (Applicant has pointed out that CFC use is not illegal by statute or regulation.) As will be discussed below, contrary to claims by Intervenor, CFC-11 is not used as a coolant for the centrifuges, nor has Intervenor provided any facts or law to indicate that use of CFC-11 is, or will be, illegal at the CEC.[5/] In short, Intervenor's discussion of factor (iii) is devoid of "specific information" from which the Licensing Board can draw an "informed inference that the

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5/ To the contrary, references provided as attachments to Intervenor's Supplemental Contentions state that production and import of class I controlled substances (which include Freon-11), not use, are prohibited. 58 Fed. Reg. 65,018, 65,064 (1993). This is consistent with the Clean Air Act, 42 U.S.C. § 7403, et. seq., which prohibits production and consumption above certain levels, § 7671c, and environmentally unsafe disposal, § 7671g, but not reuse or recycling, § 7671(10)(B). Consumption is defined as production plus imports minus exports, not use. § 7671(6).

intervenors can and will make a valuable contribution on a particular issue." Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 85 (1985). The type of specific information necessary in response to factor (iii) is best described by the Commission in the following passage:

> Our case law establishes both the importance of this third factor in the evaluation of the late-filed contentions and the necessity of the moving party to demonstrate that it has special expertise on the subjects which it seeks to raise. The Appeal Board has said: "When a petitioner addresses this criterion it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses and summarize their proposed testimony."

Braidwood, CLI-86-8, 23 NRC at 246 (quoting Grand Gulf, ALAB-704, 16 NRC at 1730); Washington Pub. Power Supply Sys. (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1177 (1983).

Intervenor has provided no specific information to indicate that its participation would assist in developing a sound record, in fact, much of the information is erroneous. Therefore, factor (iii) weighs heavily against admission of Contention T.

Factor (v)

Finally, in response to factor (v), Intervenor concedes that "admission of this contention will certainly broaden the issues and may delay the conclusion of this proceeding . . . ." Supplementary Contentions at 6. However, to lessen the weight of

these negative considerations, Intervenor counters with three points.

1. "[A]ny delay caused by litigation of this proceeding arises from a new and important legal obligation of LES, not from CANT's tardiness in raising the issue";
2. The coolant substitution "will alter the design of the facility, and may have an effect on such factors affecting public health and safety as uranium emissions from the plant"; and
3. Any delay caused by Intervenor's participation in the resolution of this issue "will be a minor delay that will almost certainly be caused by LES' selection and proposal of substitute coolant."

Regarding the first point, Applicant acknowledges its legal obligations under the Clean Air Act and associated EPA regulations, but these are certainly not new, nor were they unrecognized. As stated above, the Clean Air Act amendments limiting CFC production were enacted in 1990, and were acknowledged by Applicant in SAR § 2.1.2.2.7 and ER § 4.2.2.5.

Regarding Intervenor's second point, changing coolants could alter the design of the facility slightly, e.g., refrigerant flow rates would change if the new coolant was more or less efficient than CFC-11, but since coolant does not contact the centrifuges, uranium, or substances contacting uranium, any design changes will be of little or no safety significance.

Intervenor has provided no facts to the contrary and no facts to suggest there could be health and safety issues associated with related "uranium emissions."

Regarding Intervenor's third point, selection and installation of an alternate coolant is not expected to impose any delay on the proceeding, design, construction, or operation of the facility. At worst, only slight alterations to cooling systems are anticipated. These cooling systems do not impact any safety-related systems nor do they come into contact with centrifuges or uranium.[6/] Therefore, any delay imposed by litigation of this issue will be a substantial delay and the only delay associated with this issue.

In sum, Intervenor's justifications do not override the drawbacks of the admitted delay and beg the question of "whether, but for filing late, [Intervenor] has occasioned a potential for delay in the completion of the proceeding that would not have been present had the filing been timely." Washington Public

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6/ The feed purification desublimer represents the closest proximity of a UF_6 system to a refrigerant system. See SAR Fig. 5.2-17. The desublimer (a metal vessel) contains UF_6 inside. Tubes wrapped around the outside of the desublimer carry CFC refrigerant to heat or cool the vessel. Because the tubes are completely outside the vessel, a tube leak would release CFC into the air. Also, the desublimer is a static device. Substitution of refrigerant material will not affect speed, throughput, or radioactive emissions. Intervenor has filed no prior contention and has not expressed any concern with desublimers, nor has Intervenor shown in this present late contention a credible scenario for bringing refrigerant (completely contained in the piping of one system) into contact with UF_6 (which is completely contained in another system). Intervenor's opportunity to file such a contention was in 1991.

Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1180 (1983) (emphasis in original). Thus, this factor should weigh against a favorable balance of the four factors of § 2.714(a)(1).

4. Contention T Fails to Show That a Genuine Dispute Exists Over This Issue

To summarize Intervenor's basis for Contention T, Intervenor alleges that:

- The coolant in a uranium enrichment plant serves the essential function of carrying away the heat generated within each enrichment centrifuge.
- The CFC-11 used as a refrigerant at the CEC is stated by the DEIS to be banned by the year 2,000, but the EPA has accelerated the CFC ban to 1996,[7/]
- The Licensing Board cannot and should not license a facility whose design and operation is based on use of an illegal substance,
- If LES chooses a substitute coolant, the FSAR should be changed to explain resulting changes in the plant design because of the thermodynamic and other physical and chemical properties of the specific refrigerant that is used in the centrifuges,
- The rate of flow of UF_6 through each centrifuge, or alternatively, the dimensions of the centrifuge, depend in part on the thermodynamic properties of the coolant,
- The coolant could affect the lubricant used in the cooling system and cause premature failure of equipment, and
- The type of coolant may affect radioactive emissions because the coolant leaks into the centrifuge chamber and emissions occur when the UF_6 is separated from the

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7/ As noted above, this ban is on production, not use. Systems using existing and recycled CFC-11 can continue to operate until a suitable replacement refrigerant is available.

coolant; emissions may be altered if the coolant is changed.

Although Intervenor is correct in noting that coolant removes heat generated within each centrifuge,[8] and that CFC-11 is used as a refrigerant, Intervenor confuses centrifuge coolant, which is water from the Machine Cooling Water System, with CFC-11 refrigerant, which cools the Main Plant Cooling Water System. The Main Plant Cooling Water System cools the Machine Cooling Water System which in turn cools the centrifuges.[9] Thus, there is no connection between CFC-11 systems and the centrifuges.

Because of this confusion, Intervenor's concerns with a substitute refrigerant altering the rate of flow of UF_6 through each centrifuge, or alternatively, the dimensions of the centrifuge, as well the substitute coolant leaking into the centrifuge chamber and altering radioactive emissions are not based on any facts.

Applicant agrees that the substitute refrigerant could affect lubricants in the refrigeration system, but neither this system nor its lubricants have any contact with UF_6 systems. Therefore, equipment changes, if any, resulting from a substitute refrigerant would be purely an engineering concern, irrelevant to public health and safety.

8/ Heat results from friction and electric motor operation, not from nuclear or chemical reactions.

9/ This is described in detail in ER §§ 3.2.9.3.1 and 3.2.9.3.4.

10 C.F.R. § 2.714(b)(2)(i) requires Intervenor to provide a brief explanation of the bases of its contention. Intervenor explains its basis for Contention T in light of several "facts" which are, in fact, misconceptions. These misconceptions are the major underpinnings of Intervenor's contention; remove them and Contention T has no basis.

Applicant is aware that Intervenor has no obligation to prove the contention at the admission stage. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-880, 26 NRC 449, 457 (1987). However, Intervenor must allege at least some credible foundation, otherwise "its contention lacks the requisite basis for admission." Id.

Lacking a basis in fact, Intervenor also fails to show a genuine dispute of material fact, as required by § 2.714(b)(2)(iii). When discussing the factors of § 2.714(b)(2)(i)-(iii), the Commission said in Palo Verde, CLI-91-12, 34 NRC 149, 155, "[i]f any one of these requirements is not met, a contention must be rejected." Intervenor's Contention T, therefore, should be denied.

5. Conclusion

Intervenor has neither shown good cause for a nontimely filing by reason of the timely availability of all the information needed to formulate a basis for this contention, nor has it made a compelling showing of the other four factors. As a result it fails the balancing test of § 2.714(a)(1) and should be

denied. In addition, Contention T is not based on the CEC's design, nor can Intervenor's concerns be imposed on the actual design. Therefore, for this additional reason, Contention T must be denied.

C. Contention U

1. Summary of Intervenor's Position

Intervenor's Contention U alleges that the DEIS is inadequate because the NRC failed to consult with other appropriate federal agencies regarding the proposed project, as required by NEPA. According to Intervenor, the DEIS should be withdrawn, submitted to all appropriate agencies for consultation, and resubmitted for public comment before further action is taken in the pending proceeding. Supplemental Contentions at 8.

2. Intervenor is Without Good Cause for Filing This Contention

Intervenor claims to have satisfied the "good cause" factor for Contention U because:

- The NRC did not announce the availability of the DEIS until November 24, 1993, and
- Intervenor could not obtain assistance in preparing the contention until after the winter holidays.

Id. at 15.

Intervenor, however, has not shown good cause. Contention U cites an issue arising from NEPA, but not within the purview of § 2.714. Under § 2.714(b)(2)(iii), on issues arising out of NEPA, "the petitioner shall file contentions based on the applicant's environmental report." Contention U is not based on Applicant's ER. The regulation goes on to require that:

> The petitioner can . . . file new contentions if there are data or conclusions in the NRC [DEIS] that differ significantly from the data or conclusions in the applicant's document.

Contention U is not based on data or conclusions in the DEIS or ER that significantly differ. Rather, Contention U is a comment on, or a challenge to, the Commission's process for consulting with other agencies during EIS preparation. Specifically, Intervenor's concern with the DEIS is with the adequacy of the outcome of the NRC staff's compliance with the Commission's regulations for consulting with other federal agencies, i.e., by following the Commission's regulations, the NRC staff did not achieve the result sought by Intervenor. As such, Contention U fails, among other things, the three-part Catawba test, 17 NRC at 1043-4, specifically:

- The contention is not wholly dependent upon the content of the new document since it challenges Commission regulations,
- It could have been advanced with specificity in advance of the public availability of that document because the concern is with the regulatory process and, therefore,

- Was not tendered with the requisite degree of promptness.

Therefore, good cause is not shown.

Basis for Applicant's Position

The Commission's methodology for dealing with other agencies and the public regarding its preparation of an environmental impact statement is set forth in the Scoping process described in 10 C.F.R. Part 51. As will be discussed, this regulatory scheme has been in effect since 1984. An administrative proceeding is not the vehicle to challenge Commission rules. 10 C.F.R. § 2.758. This regulation specifies that attacks on the regulations are not permitted absent specific circumstances, which are not shown here.[10/] "[A] licensing hearing before this agency is plainly not the proper forum for . . . challenges to the basic structure of the Commission's regulatory process." Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1655 n.4 (1942) (quoting Philadelphia Electric Co. (Peach Bottom

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10/ A petition and affidavit are required for waiver of a regulation when, under special circumstances, it would not serve the purpose for which it was adopted. Specifically, Licensing Boards have held that the special circumstances must undercut the rationale for the rule and a waiver is needed to address a significant safety problem on the merits. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-10, 29 NRC 297, 300 (1989), aff'd in part and rev'd in part, ALAB-920, 30 NRC 121 (1989). Intervenor raises no issue in Contention U that rises to this level.

Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974)).

So that there can be no question, Applicant includes a discussion of the Commission's regulatory scheme on the matter.

For the past decade, the NRC has been guided by 10 C.F.R. Part 51, prepared in response to the CEQ regulations (40 C.F.R. Parts 1500 through 1508), in implementing the procedural requirements of NEPA. Section 1500.3 provides in part that these regulations are binding on all federal agencies, except where compliance would be inconsistent with other statutory requirements.

In 1984, the NRC revised its environmental regulations found in 10 C.F.R. Part 51 to take the CEQ regulations into account, subject to certain conditions. 49 Fed. Reg. 9352 (1984). In the supplementary information accompanying its final rule, the Commission emphasized that:

> By way of preface, the Commission restates its view that, as a matter of law, the NRC as an independent regulatory agency can be bound by CEQ's NEPA regulations only insofar as those regulations are procedural or ministerial in nature. NRC is not bound by those portions of CEQ's NEPA regulations which have a substantive impact on the way in which the Commission performs its regulatory functions.

49 Fed. Reg. at 9352.

Regarding the requirements in Part 51 for NRC consultation with affected or interested federal agencies, the Commission has incorporated this into the scoping process. The

public, affected state and local agencies and Indian tribes, and any other federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved are invited to participate in determining the scope of the EIS and identify significant issues. In addition, the NRC uses the scoping process to identify any cooperating agencies and, if appropriate, to allocate assignments to these agencies for completing the EIS.

> (a) The appropriate NRC staff director shall invite the following persons to participate in the scoping process . . .
>
> (4) Any other Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved or which is authorized to develop and enforce relevant environmental standards . . . .

10 C.F.R. §51.28. Section 51.29 also addresses the Commission's process of identifying cooperating agencies and consultation requirements. Thus, by way of the federal register notice regarding scoping, and the associated public hearing, the NRC solicits consultation and invites participation by interested federal agencies, the State of Louisiana, local agencies, any affected Indian tribes and other interested persons regarding any problems or objections associated with the DEIS.[11/]

11/ This is precisely the process followed in this case.

> The NRC invites the following persons to participate in the scoping process . . .
>
> c. Any other Federal agency that has jurisdiction by law or special expertise . . . .

(continued...)

The process of early participation is repeated when the DEIS, which contains the NRC's preliminary analysis and preliminary recommendations, is released for comment.[12] Only after receipt and consideration of these comments, which amounts to consultation with the commenters, will the NRC prepare a final EIS ("FEIS"). Thus, contrary to Intervenor's assertion in Contention U, the NRC did in fact consult with appropriate federal agencies through the scoping and DEIS processes, and continues to consult by resolving comments. Specifically, Intervenor notes that CEQ regulations:

> require the NRC to "emphasiz[e] interagency cooperation before the environmental impact statement is prepared, rather than submission of adversary comments on a completed document."

Supplemental Contentions at 9, quoting 40 C.F.R. § 1500.5(b). Resolution of comments at the DEIS stage prevents adversary comments on a completed document, i.e., the FEIS. Thus, this rule is being complied with.

In sum, it appears that Intervenor is dissatisfied with the adequacy of the Commission's early consultation process, as provided in Part 51, and would like the Commission to adopt a

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11/(...continued)

56 Fed. Reg. 29,727, 29,728 (1991). A list of the fifteen federal, state and local agencies consulted by the NRC during the preparation of the draft EIS is presented in Section 7 of the DEIS.

12/ 10 C.F.R. §§ 51.71 and 51.73.

different process. Since Intervenor is taking issue with the Commission's regulatory process, as manifest by the number of agencies actually consulted as a result of following that process, good cause for late filing cannot be shown by the delay of waiting for issuance of the DEIS. Contention U could have been filed based on the regulations, without the DEIS. But even then, as discussed above, this proceeding would not be the proper forum for relief.

3. Lacking Good Cause, Intervenor Has Failed to Make the Requisite Compelling Showing on the Remaining Four Factors of § 2.714(a)(1) To Warrant Admission of Its Late Contention

Applicant maintains that Intervenor's attack of the regulations is so contrary to this proceeding that additional discussion is not warranted. However, to provide the Commission with our views on the other four factors, Applicant provides additional comment.

As noted in our answer to Contention T, to justify a nontimely contention, in the absence of good cause, Intervenor must make a compelling showing on the other four factors of section 2.714(a)(1). Factors (ii) and (iv) are accorded less weight than factors (iii) and (v). Thus, even if the Licensing Board determines that factors (ii) and (iv) weigh in favor of admitting a nontimely contention, these two factors are entitled to less weight than the other three factors, which weigh against admission of the subject contention.

Factor (ii)

In response to the requirement of factor (ii), Intervenor has noted that "[t]here is no other means by which CANT's interest can be protected. This is the only proceeding in which the environmental impacts of the CEC, as assessed by all appropriate agencies, will be considered under NEPA." Supplemental Contentions at 15.

To the contrary, Intervenor's concern is with the Commission's regulations. Intervenor has the option of petitioning the Commission for rulemaking under 10 C.F.R. § 2.802.

Factor (iv)

Factor (iv) is similar, in this instance, to factor (ii). Intervenor claims that it is the only party that can represent its interests. For the reasons stated by Applicant in the discussion of factor (ii) above, Intervenor has not shown any interest appropriate to this proceeding that requires representation. Other more appropriate forums exist for resolving this concern. Thus, this factor does not weigh in favor of admitting this nontimely contention.

Factor (iii)

In response to the requirement of factor (iii), Intervenor claims its participation in the proceeding can be expected to aid in the development of a sound record with regard

to this issue. This issue, as Intervenor notes, is "purely legal," and "only a question of law." Id. at 15-16. Applicant agrees and again points out that Intervenor's concern is with the Commission's regulatory process, not with Applicant's compliance with regulations. This licensing proceeding is not the forum for such a dispute; therefore, there is no need to develop a sound record.

Further, Intervenor's discussion of factor (iii) is devoid of "specific information" from which the Licensing Board can draw an "informed inference that the intervenors can and will make a valuable contribution on a particular issue." Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 85 (1985). The type of specific information necessary in response to factor (iii) is best described by the Commission in the following passage:

> Our case law establishes both the importance of this third factor in the evaluation of the late-filed contentions and the necessity of the moving party to demonstrate that it has special expertise on the subjects which it seeks to raise. The Appeal Board has said: "When a petitioner addresses this criterion it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses and summarize their proposed testimony."

Braidwood, 23 NRC at 246.

Intervenor did not analyze this issue in a manner that would lead the Licensing Board to anticipate a valuable contribution to resolving a specified question of law. Although Intervenor cited a NEPA requirement for interagency consultation,

it did not analyze the Commission's regulations responsive to this NEPA requirement, e.g., 10 C.F.R. § 51.28(a)(3). Nor did Intervenor identify deficiencies in the NRC staff's implementation of these regulations, for example, the scoping notice in this proceeding, 56 Fed. Reg. 29,727, 29,728 (1991). Rather, Intervenor provided its opinion that specific additional agencies should have been consulted, but shed no light on the shortcomings of the Commission's regulations or process for inviting consultation. Thus, even if this licensing proceeding were the appropriate forum for this issue, factor (iii) should weigh heavily against admitting this nontimely contention.

Factor (v)

Finally, in response to factor (v), Intervenor argues that "this contention will broaden the issues minimally." Supplemental Contentions at 16. To the contrary, litigating the merits of the Commission's process for compliance with NEPA on this matter is not a trivial issue.

Further, Intervenor incorrectly states that this contention "will not delay the conclusion of this proceeding significantly because this contention involves only a question of law." Supplemental Contentions at 16. This flies in the face of Intervenor's requested relief:

> the DEIS should be withdrawn, submitted to all appropriate agencies for consultation, and resubmitted to the public for comment at the appropriate time, before further action is taken in the pending license proceeding.

Id. at 8. This would result in a substantial delay in the proceeding.

In sum, Intervenor's justifications do not override the drawbacks of the admitted delay and beg the question of "whether, but filing late, [Intervenor] has occasioned a potential for delay in the completion of the proceeding that would not have been present had the filing been timely." Washington Public Power Supply System, 18 NRC at 1180 (emphasis in original). The NRC staff followed the Commission's process for compliance with NEPA; therefore, Intervenor's concern is with the regulatory process, and this contention need not have been filed late, even if proper for this forum. Thus, this factor should weigh against a favorable balance of the four factors of § 2.714(a)(1).

In addition to a favorable balancing of the nontimely filing factors discussed above, for Contention U to be admissible, Intervenor must provide a brief explanation of the bases of the contention (§ 2.714(b)(2)(i)) and sufficient information to show that a genuine dispute exists with the applicant on a material issue of law (§ 2.714(b)(2)(iii)).

4. Contention U is Not a Genuine Dispute on a Material Issue of Law or Fact Nor Nor Does it Present an Adequate Basis

Contention U presents no issue of fact. At best this is a legal issue, as Intervenor has agreed by characterizing the issue as "purely legal," and "only a question of law." Id. at 15-16. But Contention U must fail for two reasons.

First, § 2.758, as discussed above, is clear: no attacks are permitted on Commission regulations in a licensing hearing. There is no legal issue to be considered in this case, as has been discussed above. The proper forum for Intervenor's concern is a petition for rulemaking under 10 C.F.R. § 2.802.

Second, 10 C.F.R. § 2.714(b)(2) requires Intervenor to provide sufficient information to show a genuine dispute with Applicant on a material issue of law or fact.

> This will require the intervenor to read the pertinent portions of the license application, including the Safety Analysis Report and the Environmental Report, state the applicant's position and the petitioner's opposing view.

54 Fed. Reg. at 33,170. Further, § 2.714(b)(2)(iii) requires that Intervenor, on issues arising under NEPA, "shall file contentions based on the applicant's environmental report." New contentions can be filed if there are data or conclusions in the DEIS "that differ significantly from the data or conclusions in the applicant's document." Intervenor fails this test--Contention U is not based on any of Applicant's documents.

This result is consistent with the Commission's regulations governing the licensing hearing and the process for commenting on the DEIS. The NRC staff's position on environmental issues in the hearing will be based on the FEIS, which will be offered into evidence. 10 C.F.R. Part 2, Appendix A § V(d). The NRC staff will not present its case until the FEIS is available. Id. Thus, the NRC staff cannot present its case on any DEIS contentions until after the FEIS is available, at

which point a flaw in the DEIS which is not cured in the FEIS will provide the basis for a litigable contention. Such flaws should be prevented. Therefore, in the interim, the Commission has provided a proces for commenting on the DEIS in 10 C.F.R. § 51.73. This process ensures that flaws in the DEIS are brought to the attention of the appropriate NRC staff members prior to preparation of the FEIS. Contention U should be filed as a comment in this DEIS forum.

5. Additional Issues

Intervenor has characterized Contention U as a purely legal issue. Therefore, Applicant has addressed the relevant legal matters. However, as part of its basis, Intervenor has raised a number of factual issues to support its argument for including the EPA (even though admittedly consulted), the DOE and the State Department in the list of federal agencies that should also have been consulted by the NRC during the DEIS preparation process.

Applicant takes exception to Intervenor's allegations about the need for the facility, Supplemental Contentions at 10-11. This matter is the subject of Intervenor's Contention J.4 and will not be addressed further here.

Applicant takes exception to Intervenor's allegations about the need for an "agreement of cooperation," Id. at 11. This is not a matter in issue in this proceeding. If Intervenor intends to raise this matter to the level of a contention,

Applicant expects Intervenor to file an appropriate petition. Otherwise, Applicant sees no reason to address the matter here. If the Licensing Board disagrees, Applicant reserves the right to respond formally to this matter at an appropriate time.

Applicant takes exception to Intervenor's allegations of national security and proliferation issues, Id. at 12-13. In its December 19, 1991, Memorandum and Order (Ruling on Contentions) at 50-51, the Licensing Board rejected Intervenor's Contention R, which alleged these issues. Applicant regards Intervenor's recent allegations on this matter to be an attempt to revive the issue and sees no need to address the issue again here.

Applicant takes exception to Intervenor's request to obtain additional input from EPA on the question of uses and effects of hydrofluoric acid ("HF"). Id. at 13-14. In its December 19, 1991, Memorandum and Order at 22-23, the Licensing Board denied Intervenor's Contention G, which challenged the Commission's analysis of the effects of HF. Applicant regards Intervenor's request on this matter to be an attempt to revive the matter and sees no need to address the issue again here.

6. Conclusion

Contention U should not be admitted for several reasons. As a challenge to Commission regulations, the proper forum for Intervenor to raise this issue is a petition for rulemaking under 10 C.F.R. § 2.802. If the regulations are

inadequate, this action will allow Intervenor to voice its underlying concern in a proper forum. Intervenor also should comment on the DEIS under 10 C.F.R. § 51.73 to cure the immediate concern. As noted above, the Commission has long held that a licensing proceeding:

> is plainly not the proper forum for . . . challenges to the basic structure of the Commission's regulatory process . . . . [I]f someone wants to advance generalizations regarding his particular views of what applicable policies ought to be, a role other than as a party to a trial-type hearing should be chosen.

Peach Bottom, 8 AEC at 20, 21 n.33 (1974).

Also, as a challenge to regulations, Contention U could have been brought in a timely manner and is, therefore, without good cause. The DEIS consultation process has not changed since 1991. To admit this nontimely contention without good cause, and without a favorable balancing of the remaining factors of the nontimely petition balancing test, especially in light of the other forums available for relief, would result in unjustified delay.

D. Contention W

1. Intervenor's Contention W alleges that:

- The DEIS is inadequate because it fails to address the impacts, costs, and benefits of ultimate disposal of DUF_6 tails, or the cumulative and generic impacts of DUF_6 tails disposal;

- The DEIS contains no information whatsoever regarding the nature and environmental impacts of the process for

converting DUF_6 to U_3O_8, or the impacts of permanently disposing of these U_3O_8 tails;

- It is impossible to determine from the DEIS the basis for the NRC's estimate that tails disposal will cost $12.6 million/year;
- The NRC has failed to evaluate the cumulative and generic impacts of adding to the huge (and growing) national inventory of DUF_6 tails, for which the U.S. government has yet to identify an acceptable means of disposal; and
- The NRC, in consultation with DOE should be required to evaluate these impacts before LES can be licensed to produce more DUF_6.

2. Contention W is a Comment on the DEIS and Is Premature as a Contention

Contention W is a comment on the DEIS and should be incorporated into the comment process to ensure proper attention by the NRC staff. Further, Contention W is premature in light of the comment process available for resolving this concern. If Intervenor's comment is not incorporated in the FEIS, or if the concern is not resolved to Intervenor's satisfaction, Intervenor can pursue the matter at that later time.[13/]

Regarding Intervenor's concern, Applicant believes that additional discussion of environmental effects of DUF_6 disposition may be appropriate to augment the existing materials

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13/ According to the Licensing Board's May 7, 1992, Memorandum and Order (Memorializing Prehearing Conference), ASLBP No. 91-641-02-ML, the discovery period remains open for 8 weeks following publication of the FEIS.

on tails disposition,[14/] but Applicant objects to the broad scope and high level of detail that Intervenor alleges are required.

The extent of the environmental analysis of DUF_6 disposition is bounded by the nature of how this issue is involved in this proceeding. Because the precise mode of decommissioning and DUF_6 disposal has not been determined by regulation,[15/] the level of analysis will, of necessity, be general and should be accommodated easily in the FEIS as part of the comment resolution process.

Applicant's position on DUF_6 disposition has been, and continues to be, compliance with all applicable regulatory requirements throughout the project, including establishing an appropriate decommissioning fund and process to address tails disposition. Initially, Applicant intended to retain DUF_6 on site for the life of the facility as a potential resource, and either sell the material (if a market existed) or convert to UF_4 followed by disposition at a licensed disposal facility. This would have been consistent with the U.S. Government's treatment of such material over many years. Also to put the issue in perspective, DUF_6, of course, is generated as a normal and necessary part of the enrichment process and would occur in

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14/ DUF_6 removal and disposition is addressed at DEIS §§ 2.4.5, and 4.3.5.

15/ Applicable NRC decommissioning regulations set forth at 10 C.F.R. § 70.38 do not contemplate the submittal of a final decommissioning plan as part of a materials license application.

virtually the same proportions to meet the fuel needs of U.S. reactors whether or not the CEC is operating. So tails generated by the CEC should not be considered as an "incremental" impact resulting from this licensing, as the intervenor suggests. In light of continued DUF_6 production by the U.S. Enrichment Corporation, the incremental environmental impact of Applicant's DUF_6 production is nil. On the other hand, as a result of discussions with NRC staff, the Applicant is the first U.S. entity to address the possible methodologies and costs of disposal and has accordingly revised its decommissioning cost estimate to accommodate conversion to U_3O_8 and disposal at a burial facility.

These proposed disposition methods are reasonable and responsive to the current regulatory structure, but this structure is not yet fixed. Currently DOE is preparing a plan for disposition of tails[16/] which may alter the ultimate regulatory structure for DUF_6 disposition. Thus, it would be premature to adopt a prescriptive position, and expend resources analyzing that position, until one of the many viable options is determined to be the proper course to pursue.[17/] This determination may not be feasible until well after the license is

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16/ Required under the Energy Policy Act of 1992, Pub.L. 102-486 § 1016.

17/ The Licensing Board, in its December 19, 1991, Memorandum and Order (Ruling on Contentions) agreed, noting on page 9 that only "a plausible strategy is required" and "that before a license may issue, such a disposal plan must comply with all applicable environmental laws."

issued.[18/] In the interim, only a general discussion of the environmental impact of DUF_6 disposition is reasonable and necessary.

In light of the current state of regulations on this matter, Applicant does not consider the treatment of tails in the DEIS to be a violation of NEPA, as stated by Intervenor. Supplemental Contentions at 17. (The comment process itself is the appropriate mechanism to suggest areas in the draft that might need augmentation.) Nor is a generic EIS required prior to licensing,[19/] as suggested by Intervenor. Id. at 20. With the above qualifications and reservations, Applicant believes that the subject matter raised in Contention W should be addressed by the NRC staff as a comment on the DEIS, and expects that any additional materials warranted by the comment can be accommodated

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18/ "[A]gencies may not be precluded from proceeding with particular projects merely because the environmental effects of that project remain to some extent speculative." State of Alaska v. Andrus, 580 F.2d 465, 473 (D.C. Cir. 1978), vacated in part, sub nom., Western Oil and Gas Association v. Alaska, 439 U.S. 922 (1978); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-117A, 16 NRC 1964 (1982).

19/ A generic EIS is required when multiple facilities are involved in the same "major federal action." Scientists' Institute For Public Information, Inc. v. Atomic Energy Comm'n, 481 F.2d 1079 (1973) (holding that a GEIS was required for the Liquid Metal Fast Breeder Reactor Program which involved licensing multiple facilities). In contrast, the "major federal action" in the instant case involves NRC licensing of a single facility. Since the DOE site is not within NRC jurisdiction and is beyond the scope of this particular federal action, the environmental effects of the DOE site would be better considered in a subsequent EIS.

by the FEIS. Applicant expects that the FEIS will address the environmental impacts of DUF_6 disposition in a general manner consistent with the available information on this subject and applicable laws and regulations.

IV. CONCLUSION

Applicant requests the Licensing Board to deny Contention T for being nontimely without good cause or other justification, and for being without an adequate basis as a result of Intervenor's misunderstanding of the CEC design.

Applicant requests the Licensing Board to deny Contention U as an impermissible attack on the Commission regulations, for failing to provide sufficient information to show a genuine dispute on a material issue of law or fact, and for being nontimely without good cause or other justification.

Applicant requests the Licensing Board to reject Contention W as premature; rather the matter should be referred to the NRC staff to be considered as a comment on the DEIS.

LOUISIANA ENERGY SERVICES, L.P.

John Mac Lin for:
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WINSTON & STRAWN,
ATTORNEYS FOR LOUISIANA ENERGY SERVICES, L.P.

January 31, 1994

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

'94 FEB -1 P4:52

In the Matter of	)	
	)	
LOUISIANA ENERGY SERVICES, L.P.	)	Docket No. 70-3070
	)	
(Claiborne Enrichment Center)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "ANSWER OF LES TO CANT'S CONTENTIONS T, U AND W" have been served on the following by deposit in the United States Mail, first class, this 31st day of January, 1994:

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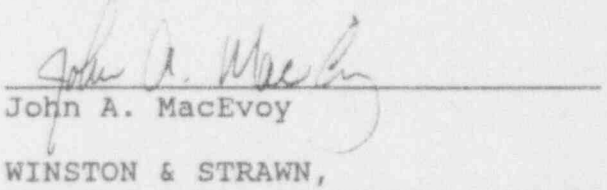

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